

CCASE:
MSHA (SMITH & CO.) V. STAFFORD CONSTRUCTION

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FEDERAL MINE SAFETY & HEALTH REVIEW COMMISSION
WASHINGTON, D.C.

April 29, 1983

SECRETARY OF LABOR,
MINE SAFETY AND HEALTH
ADMINISTRATION (MSHA)
EX REL. STEPHEN SMITH,
DONALD HANSEN, THOMAS
SMITH AND PATRICIA
ANDERSON

Docket Nos. WEST 80-71-DM
WEST 80-155-M
WEST 80-156-DM
WEST 80-165-DM

v.

STAFFORD CONSTRUCTION
COMPANY

DECISION

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). Each case involves an alleged discriminatory discharge by the Stafford Construction Company in violation of section 105(c)(1) of the Mine Act. 1/

1/ Section 105(c)(1) provides:

No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any

proceeding under or related to this Act or has testified or is about to testify in any proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

~619

The administrative law judge held that Stafford Construction had unlawfully discharged Stephen Smith and Thomas Smith in violation of section 105(c)(1), but that it had lawfully discharged Donald Hansen and Patricia Anderson. 2/

We granted cross petitions for review filed by the Secretary and Stafford Construction. 3/ The issue in each of the cases before us is whether the judge's decision is supported by substantial evidence.

For the reasons set forth below, we conclude that in each case it is and, accordingly, we affirm the judge's holdings in all three cases.

The Stephen Smith Case (WEST 80-156-DM)

Stephen Smith was employed by Stafford Construction as a D-9 bulldozer operator at the company's Cotter Mill project, where it was building a retention dam. Smith was hired on July 10, 1978, and he was discharged on December 20, 1978. His termination slip stated that he was being discharged as a result of a "reduction in force."

At the hearing, the Secretary alleged that Stephen Smith was discharged because of his involvement in safety matters at the project site, including Stafford Construction's belief that he was informing the Mine Safety and Health Administration ("MSHA") as to those safety matters. Stafford Construction defended principally on the ground that Smith was discharged as a result of a reduction in the company's work force, necessitated by the onset of winter. The judge rejected Stafford Construction's reduction-in-force defense, and held that the company violated section 105(c)(1) because it had discharged Stephen Smith for engaging in "protected activity." 3 FMSHRC at 2181. The protected activity referred to by the judge was Smith's involvement at the Cotter Mill project in safety complaints, which also led Stafford management to believe that he had reported safety problems to MSHA. 3 FMSHRC at 2179-82.

Based upon our review of the record, we conclude that substantial evidence supports the judge's holding of discriminatory discharge.

First, it is undisputed that Stephen Smith was active in safety matters at the Cotter Mill project and that Stafford Construction was aware of his safety activity. Second, two of Stafford Construction's management officials testified that Smith was discharged because of his safety activity.

Donald Hansen, the assistant project manager at the time of Smith's discharge, stated that prior to the discharge he was involved in

conversations with other management personnel concerning the reporting of safety-related information by company employees to MSHA. Tr. 671. Hansen recalled a conversation he had on that subject with Harold Stafford, the company president, and Everett Poynter, the project manager. Hansen testified:

2/ The judge's decision is reported at 3 FMSHRC 2177 (September 1981) (ALJ).

3/ The Secretary did not, however, seek review of the case involving Donald Hansen (WEST 80-71-DM).

~620

It was shortly after I became assistant project manager. I don't remember the exact date but Harold, myself and Mr. Poynter were having lunch, at which time, they were discussing someone within the employment was turning in complaints to MSHA as well as to the Operating Engineers Number 9.

* * * * *

Mr. Stafford told both myself and Mr. Poynter that if we find out who these individuals were, that we were to find a reason to terminate them immediately.

Tr. 671 (emphasis added). Hansen further testified that after Stephen Smith had been discharged, Poynter informed him, "[T]hat Mr. Smith was the individual who had been making complaints to MSHA and that Harold [Stafford] wanted him fired and that is the reason that he was terminated." Tr. 673 (emphasis added).

Likewise, Patricia Anderson, the company's secretary-bookkeeper at the Cotter Mill project, testified that prior to Stephen Smith's discharge she had both taken part in, and had overheard, several conversations involving management personnel in which the subject of employee safety complaints to MSHA was discussed. The first such conversation occurred approximately one week prior to Smith's discharge and involved her and Richard Schneider, the company's maintenance superintendent. Regarding that conversation, Anderson stated, "[Management] had determined that it was Mr. Smith who was informing MSHA of all the problems on the job" and "that being involved in informing MSHA of the accidents and problems that were going on the job, that he wouldn't be with the company." Tr. 189. Anderson also stated that Schneider had called Smith "a son-of-bitch and stuff like that" and that his passing information to MSHA "was costing him his job." Tr. 190, 192.

In addition, Anderson further testified that approximately one week prior to Smith's discharge she had a similar conversation with Harold

Stafford, president of the company. Anderson stated, "He said just that Steve Smith was passing information to MSHA, and that they knew he was the one, and that he would be terminated, that they didn't tolerate that." Tr. 194. Anderson also credited Mark Jackson, the second shift foreman, with stating that it was Stephen Smith who was informing MSHA as to safety matters at the project site. Tr. 199. Concerning Stafford Construction's business justification for the discharge, Anderson testified that the company was not in the process of a reduction in force at the time that Stephen Smith was discharged. Anderson, who kept the company's employment records at the Cotter Mill project, stated that she believed that the company was operating two shifts per day around that period of time and that it had also hired new employees. She further testified that there

~621

were approximately 160 employees in January of 1979--the same number as there had been in December of 1978. (Smith was terminated on December 20, 1978.) Anderson added that both Harold Stafford and Donald Hansen informed her that the company had intended to work through the winter. Although the Cotter Mill project was shut down on January 5, 1979, because of a ground freeze (Tr. 181), Anderson testified that prior to that date there had been no decrease in the hiring of employees.

The foregoing evidence amply supports the judge's conclusion that Stephen Smith was fired because of his protected safety complaints and management's belief that he had reported safety problems to MSHA. The evidence also supports the judge's rejection of the reduction-in-force defense. Discriminating against a miner because of safety complaints violates the express prohibitions of section 105(c)(1) of the Mine Act. Even if Stephen Smith's first complaint to MSHA on December 20, 1978, was made shortly after the decision to fire him (3 FMSHRC at 2182), discrimination against a miner based on a mistaken belief that he has engaged in protected activity also violates section 105(c)(1) of the Act. *Moses v. Whitley Development Corp.*, 4 FMSHRC 1475, 1480 (August 1982). Accordingly, we hold that substantial evidence supports the judge's decision that Stephen Smith was discharged in violation of the Mine Act.

The Thomas Smith Case (WEST 80-165-DM)

Thomas Smith was also employed by Stafford Construction as an equipment operator at the Cotter Mill project. (He is the brother of complainant Stephen Smith). Thomas Smith was discharged on January 5, 1979, purportedly for negligently breaking the lift arm on a No. 16 motorgrader. At the hearing, Thomas Smith claimed that the real reason why he was discharged was because he and his brother, Stephen, had filed a safety complaint with MSHA on December 20, 1978. The judge held that Thomas Smith was unlawfully discharged by

Stafford Construction for filing the safety complaint with MSHA on December 20, 1978, a protected activity. 3 FMSHRC at 2184, 2187. The judge rejected, as pretextual, Stafford Construction's defense that Smith was discharged because he had negligently damaged the motorgrader. 3 FMSHRC at 2186-87.

We hold that substantial evidence supports the judge's decision that Thomas Smith was discharged in violation of section 105(c)(1). The record establishes that Smith was active in safety matters at the Cotter Mill project. During the months of September, October and November of 1978, Smith had made four or five oral safety complaints to management personnel. Tr. 746-47. Specifically, he complained about insufficient lighting on the bulldozer that he was operating, as well as a short smoke stack that was causing smoke to blow in his face. Smith also filed, along with his brother, a written safety complaint with MSHA on December 20, 1978. Thomas Smith's signature is on the complaint, and it was shown to other workers at the Cotter Mill project on the morning of December 20.

~622

In addition, the record establishes that contrary to the contentions of Stafford Construction, Thomas Smith was instructed by his supervisor to operate the motorgrader in the area where the lift arm was broken. Furthermore, Smith had been operating the motorgrader in that area for approximately two hours before the accident occurred. As found by the judge, Stafford Construction's discharge of Smith was inconsistent with its past practice of discharging employees for gross negligence only, which was not the case here. See 3 FMSHRC at 2185-87. This disparate treatment strongly suggests that the explanation offered by Stafford Construction for discharging Smith was a pretext.

Finally, the testimony of Donald Hansen, the assistant project manager at the time of Smith's discharge, evidences the animus that Stafford Construction maintained toward employees who engaged in safety activity at the project site. Hansen testified that Harold Stafford, the company president, in referring to Thomas Smith stated, "There is the SOB who is causing us a lot of -- whose brother is causing us a lot of problems, and if you get a chance, fire him." Tr. 848. The problems referred to by Harold Stafford were the safety complaints that were being filed with MSHA.

In sum, the record establishes that Thomas Smith was active in safety matters and that he had filed a safety complaint with MSHA on December 20, 1978. It also establishes that Stafford Construction took a dim view of such safety activity and that the reason offered by Stafford Construction for Smith's discharge were pretextual. Accordingly, for the reasons mentioned above, we affirm the judge's holding that Thomas Smith was unlawfully discharged in violation of

section 105(c)(1).

The Patricia Anderson Case (WEST 80-155-DM)

Patricia Anderson began working for Stafford Construction as a secretary-bookkeeper at the company's Cotter Mill project in June of 1978. She was discharged in February of 1979. The reason given by Stafford Construction for her discharge was incompetence.

Anderson maintained that she was discharged because she had refused to lie to the MSHA representatives who were investigating Stephen Smith's discrimination complaint. Specifically, Anderson claimed that she was asked by Harold Stafford to tell the MSHA investigators that Stephen Smith was discharged as part of a reduction in force, even though the company records did not reflect that a reduction in force took place. Anderson was fired two weeks after she told Harold Stafford that she could not tell MSHA that the company had undergone a reduction in force.

The judge held that Anderson was lawfully discharged. 3 FMSHRC at 2198. He stated that Stafford Construction did not interfere with Anderson's right to provide a statement to MSHA in its investigation ~623

of Stephen Smith's complaint and that her discharge was in no way connected to her statement to Harold Stafford that she could not tell MSHA that Stephen Smith was terminated as part of a reduction in force. 3 FMSHRC at 2197. Accordingly, the judge did not reach the issue of Anderson's competence.

The resolution of this case depends in large measure upon the testimony of Anderson regarding the events of January 30, 1979.

Two separate meetings were held that evening as Stafford Construction management personnel prepared for interviews to be conducted the next day by the MSHA representatives investigating Stephen Smith's discrimination complaint. At the first meeting, Patricia Anderson and Richard Schneider, the maintenance superintendent, reviewed employee files and compiled a list as to the dates of employee terminations and the reasons for their termination.

Anderson was called to a second meeting of Stafford Construction management personnel that evening. Harold Stafford, the president of the company, was present at that meeting. Anderson testified that the purpose of that second meeting was to instruct her as to what to tell the MSHA investigators the next day. She stated that at the meeting, she was asked to tell MSHA that Stephen Smith was discharged due to a reduction in force. Anderson testified that she told Harold Stafford that she couldn't lie -- that she couldn't tell MSHA that there had been a reduction in force. She added that Harold Stafford then told her to say whatever she wanted to MSHA. Tr. 1348-49.

The judge stated that the only testimony regarding the subject of lying to MSHA was the gratuitous statement of Anderson that she

couldn't lie. 3 FMSHRC at 2197. Moreover, the judge noted that Anderson admitted that she was not specifically asked to lie by Harold Stafford (Tr. 1375-76). Id. The judge concluded, therefore, that Anderson's subsequent discharge was in no way connected to her statement to Harold Stafford that she would not tell the MSHA investigators that Stephen Smith was discharged as a result of a reduction in force.

We agree with the judge's treatment of Anderson's testimony.

Although Anderson may have perceived Harold Stafford's request that she provide MSHA with a statement that a reduction in force had taken place as a request that she lie to the MSHA investigators, her testimony clearly establishes that such was not in fact the case.

Harold Stafford did not ask Anderson to lie to the MSHA investigators. In fact, Anderson credits him with telling her to say whatever she wanted to MSHA. Further, as the judge found, the record does not show that Harold Stafford's reliance on the reduction-in-force defense was in bad faith. 3 FMSHRC at 2197. Finally, as the judge also noted, she was fired nearly two weeks after these meetings, and was not then preparing to testify, nor had she testified in the case. 3 FMSHRC at 2198.

~624

In sum, the record does not support Patricia Anderson's claim that she was discharged in retaliation for her refusal to lie to MSHA. The only protected activity that the Secretary argued below, and the judge considered, was her right to testify truthfully. Therefore, she failed to establish a prima facie case that her discharge was, at least partially, motivated by protected activity on her part.

Accordingly, we affirm the judge's holding that Anderson's discharge did not violate the Mine Act

~625

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~626

Administrative Law Judge Decisions